No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 577 F.2d 372. The memorandum opinion of the district court (App. D, *infra*, 15a-23a) is reported at 423 F. Supp. 537.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 13a) was entered on June 12, 1978. A petition for rehearing was denied on August 7, 1978 (App. C, *infra*, 14a). On October 26, 1978, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including November 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may obtain collateral relief from his conviction under 28 U.S.C. 2255 solely because the district court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

At the time of respondent's guilty plea, Rule 11 of the Federal Rules of Criminal Procedures provided:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequence of the plea.

Rule 11 now provides in pertinent part:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right

to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT

1. A 19-count indictment filed in the United States District Court for the Eastern District of Michigan charged respondent and 21 co-defendants with conspiracy to manufacture and distribute, and to possess with intent to distribute, heroin, cocaine, LSD, and other controlled substances, in violation of 21 U.S.C. 846, and with various substantive narcotics offenses, in violation of 21 U.S.C. 841(a)(1) and 843(b). On May 24, 1974, pursuant to a plea bargain whereby the remaining charges against him would be dismissed and the government would not prosecute him for a bail violation, respondent offered to plead guilty to the conspiracy count of the indictment.

At the outset of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Proce-

dure, the prosecutor disclosed the existence and terms of the plea agreement (Tr. 2-3).[1] The district court then questioned respondent and determined that he was not suffering from any physical or mental impairment, that he was fully aware of what he was doing, and that he understood the constitutional rights that he would waive by pleading guilty (Tr. 4-7). The court informed respondent that he could be sentenced to a maximum of 15 years' imprisonment and a $25,000 fine if the plea were accepted,[2] but it failed to mention that respondent would also

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[1] "Tr." refers to the transcript of the May 24, 1974, Rule 11 proceeding. "H." refers to the transcript of the September 8, 1976, hearing on respondent's motion to vacate his guilty plea.

[2] The pertinent colloquy was as follows (Tr. 7-8):

THE COURT: Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

THE DEFENDANT: No, sir.

THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?

THE DEFENDANT: I have now, yes.

THE COURT: Now you know?

THE DEFENDANT: Yes, sir.

* * * *

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.

RESPONDENT: Yes, sir.

THE COURT: You understand that?

RESPONDENT: Yes, sir.

be subject to a mandatory special parole term of at least three years.[3]

After the court outlined the nature of the charges, respondent explained his involvement in the conspiracy and confessed to his guilt (Tr. 9-14). Respondent acknowledged that he had not been forced or threatened to plead guilty and that no promises had been made in exchange for the plea other than those contained in the plea bargain (Tr. 15). Respondent's counsel advised the court that he was satisfied that there was a factual basis for the plea and that respondent knew "full well the consequences of a guilty plea * * *" (Tr. 15-16). The court then accepted

[3] Section 401(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1260, 21 U.S.C. 841(b), provides that persons convicted of a violation of the Act be given a term of "special parole," in addition to any other sentence imposed. The special parole term, which must be at least two, three, or four years in length (depending on the nature of the offense) and which may be as long as life (see, *e.g.*, *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Rivera-Marquez*, 519 F.2d 1227, 1228-1229 (9th Cir.), cert. denied, 423 U.S. 949 (1975); *United States* v. *Rich*, 518 F.2d 980, 987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976)), "is separate from and begins *after* the usual sentence terminates, including any period of supervision. In the event an individual should violate during the period of supervision prior to the beginning of the SPT [Special Parole Term], he will be returned as a violator of the basic period of supervision with the SPT still to follow unaffected." Bureau of Prisons Policy Statement 7500.43 at 2 (January 18, 1973). If a defendant violates the conditions of special parole, he is returned to prison to serve the entire special parole term, not merely the unexpired portion. 21 U.S.C. 841(c).

respondent's plea of guilty, finding that the plea was entered voluntarily with a full understanding of its possible consequences and was supported by a factual basis (Tr. 16). Thereafter, on September 19, 1974, respondent was sentenced to 10 years' imprisonment, to be followed by five years' special parole, and a $5,000 fine.

2. Respondent did not appeal. Approximately two years after sentencing, on August 10, 1976, respondent moved to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that the district court had violated Rule 11, Fed. R. Crim. P., by failing to inform him of the mandatory special parole term at the time his plea was entered. The motion did not assert that respondent had actually been unaware of the special parole provision or that, if he had been notified of it by the trial judge, he would not have pleaded guilty.

The district court held a hearing on respondent's Section 2255 motion on September 8, 1976. At the hearing, respondent's counsel stated that he could not recall whether he had discussed the special parole term with respondent prior to entry of his guilty plea (H. 6-7), but he did acknowledge that, before a client pleaded guilty, it was his practice to review with the client the possible sentence that could be imposed (H. 7). Counsel also admitted that he had represented to the court at the Rule 11 proceeding that respondent was fully aware of the consequences of his plea (H. 10).

The district court denied respondent's motion to vacate sentence. Although it agreed that the record of the guilty plea proceeding did not reflect that respondent had been told of the mandatory special parole provisions (App. D, *infra*, 16a), the court concluded that respondent had not been prejudiced by the omission and that he therefore was not entitled to collateral relief from his conviction. The court observed that respondent's total sentence did not exceed the maximum sentence that he was informed he could receive as a result of his guilty plea (*id.* at 18a). In addition, the court found that respondent's plea had been voluntarily entered and that the technical defect had not resulted in any fundamental unfairness (*id.* at 22a & n.3).

3. The court of appeals reversed and remanded with instructions to vacate the sentence entered upon the guilty plea and to allow respondent to plead anew. Finding that the district court's ruling was "squarely contrary" to *United States* v. *Wolak*, 510 F.2d 165 (6th Cir. 1975), the court of appeals held that the mandatory special parole term was a direct consequence of a guilty plea, that the district court had therefore violated Rule 11 in failing to advise respondent of that consequence of his plea, and that (relying on *McCarthy* v. *United States*, 394 U.S. 459 (1969)) the proper remedy for such noncompliance was to allow respondent to withdraw the plea (App. A, *infra*, 1a-2a).

The court recognized (App. A, *infra*, 10a) that *McCarthy* involved a *direct* appeal from a conviction

entered upon a guilty plea and that this Court had subsequently remarked in *Davis* v. *United States*, 417 U.S. 333 (1974), that the failure to comply with the formal requirements of a rule of criminal procedure does not warrant *collateral* relief absent a showing of " 'a fundamental defect which inherently results in a complete miscarriage of justice' " (417 U.S. at 346, quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). It further acknowledged that "at first blush the Rule 11 violation at issue here did not seem to rise to the level" required to satisfy the *Davis* test (App. A, *infra*, 9a). The court resolved the conflict by holding that prejudice inheres in every failure to comply with Rule 11 and that such claims are therefore cognizable in a Section 2255 proceeding (*id.* at 10a). The court concluded (*id.* at 10a-11a; footnote omitted):

> We reconcile *McCarthy* and *Davis* by holding that a Rule 11 violation is per se prejudicial and thus must be a "fundamental defect which inherently results in a complete miscarriage of justice." We feel that any other reconciling of the two cases which emphasizes *Davis* over *McCarthy* should come only from the Supreme Court.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that a defendant may collaterally attack his conviction, years after the entry of his guilty plea, merely because the district court failed to comply precisely with the requirements

of Rule 11 of the Federal Rules of Criminal Procedure departs significantly from this Court's construction of the scope of relief under the federal habeas corpus statute (28 U.S.C. 2255) and conflicts with the rulings of several other circuits. Moreover, the decision of the court below is of great practical importance because of its broad implications for the finality of judgments in large numbers of federal criminal cases. Guilty pleas form the basis for the substantial majority of federal convictions, and Rule 11 requires the district courts to comply with a series of procedures, many of which are unnecessary to a determination of voluntariness, prior to accepting such pleas. The court of appeals' virtual elimination of the requirement that there be a showing of prejudice before a violation of Rule 11 may lead to collateral relief will invite defendants to attack pleas that were knowingly and voluntarily entered, in the hope that reprosecution would be difficult or impossible.

1. In *McCarthy* v. *United States*, 394 U.S. 459, 472 (1969), the Court held that "a defendant whose plea has been accepted in violation of Rule 11 [of the Federal Rules of Criminal Procedure] should be afforded the opportunity to plead anew * * *." The court of appeals assumed that this ruling, announced in the context of a direct appeal, was equally applicable to collateral review and that respondent would therefore be entitled to vacate his conviction under 28 U.S.C. 2255 if the record of his guilty plea proceeding substantiated his contention that the district

court had violated Rule 11. Since the court below found that respondent had not been informed of the mandatory special parole term, which unquestionably is a "consequence of the plea,"[4] it concluded that he must be afforded the opportunity to plead anew (App. A, *infra*, 4a).

This decision ignores the essential distinction between direct and collateral attacks upon a conviction. Because of the "strong interest in preserving the finality of judgments," *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977), the crucial question in a pro-

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[4] Respondent's guilty plea was entered under the 1966 version of Rule 11, which required the district court to determine that the defendant understood "the consequences of the plea." Effective December 1, 1975, Rule 11(c)(1) was amended to require the court, before accepting a plea of guilty or nolo contendere, to inform the defendant on the record of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law * * *." This change was intended to eliminate confusion over what is a direct "consequence" of a guilty plea. As the Advisory Committee remarked, "[t]he objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentences and also the longest possible sentences for the offense to which he is pleading guilty." 62 F.R.D. 271, 279 (1974). Hence, we do not dispute that failure to notify a defendant pleading guilty to a controlled substance offense of the mandatory special parole term would constitute a violation of the new Rule 11. See *United States* v. *Del Prete*, 567 F.2d 928, 929 (9th Cir. 1978). But see *United States* v. *Adams*, 566 F.2d 962, 969 (5th Cir. 1978).

ceeding under Section 2255 is not whether an error may have been committed, as would be the case on direct review, but whether the "resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Thus, merely because the district court's failure to comply with the requirements of Rule 11 might have permitted respondent to withdraw his plea if the defect had been raised on direct appeal, it does not follow that the same relief should be available on a motion to vacate sentence. The appropriate inquiry at that point concerns not whether "errors of law [were] committed by the trial court" but whether the defendant's confinement offends the Constitution. *Sunal* v. *Large*, 332 U.S. 174, 179, 181-182 (1947).

The Court emphasized this important distinction in *Hill* v. *United States*, 368 U.S. 424, 426 (1962), which presented the question "whether a district court's failure to afford a defendant an opportunity to make a statement at the time of sentencing furnishe[d], without more, grounds for a successful collateral attack upon the judgment and sentence." Although the right of allocution was expressly guaranteed to a defendant by Rule 32(a), Fed. R. Crim. P., and was deemed to be an ancient and valuable one (*Green* v. *United States*, 365 U.S. 301, 304 (1961)), and although a violation of Rule 32(a) necessitated reversal of the conviction if raised on direct appeal (*Van Hook* v. *United States*, 365 U.S. 609 (1961)), the Court denied relief under Section 2255, holding that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 368 U.S. at 429. The Court explained (*id.* at 428):

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27.

See also *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976); *Sunal* v. *Large*, *supra*, 332 U.S. at 178-179.

By the same token, the district court's failure to follow the formal requirements of Rule 11 should not entitle a defendant to relief on collateral attack unless he was prejudiced by the violation. Where, as here, the violation relates to the trial judge's failure to notify the defendant of the mandatory special parole provisions, prejudice could be demonstrated by a showing that the defect in fact rendered the guilty plea involuntary (for example, if the defendant would not have pleaded guilty had he been aware of the special parole term)[5] or that it would be manifestly

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[5] A conviction entered upon an involuntary plea of guilty is subject to collateral attack. See *Fontaine* v. *United States*, 411 U.S. 213 (1973); *Machibroda* v. *United States*, 368 U.S. 487 (1962).

unfair, in light of the absence of an express warning about special parole, to hold him to his plea[6] (for example, if the sentence imposed, with the addition of the period of special parole, exceeded the maximum sentence that the defendant was told he could be given).[6] See *Del Vecchio* v. *United States*, 556 F.2d

[6] In that circumstance, of course, the appropriate remedy under Section 2255 may well be to reduce the defendant's sentence to comport with the information he received at the time of his plea. See *Richardson* v. *United States*, 577 F.2d 447, 452 (8th Cir. 1978), petition for cert. pending, No. 78-5263.

Contrary to the court of appeals' assumption (App. A, *infra*, 9a), there is no tension between the standards for collateral relief articulated in *Hill* and *Davis* and the prophylactic rule announced in *McCarthy* for noncompliance with Rule 11. *McCarthy*, it bears repeating, was a direct appeal, and the Court emphasized that its decision was "based solely upon our construction of Rule 11 and our supervisory power over the lower courts," rather than upon the Constitution (394 U.S. at 464). Moreover, although the Court remarked that "prejudice inheres in a failure to comply with Rule 11" (*id.* at 471), it did not suggest that such prejudice—which was defined merely as "depriv[ing] the defendant of the Rule's procedural safeguards" (*ibid.*)—was of a magnitude that would entitle a defendant to habeas corpus relief. Indeed, strong evidence that the Court did not consider every plea entered in violation of Rule 11 to be fundamentally unfair is offered by its decision not to apply *McCarthy* retroactively (*Halliday* v. *United States*, 394 U.S. 831 (1969)) and by the distinction it carefully drew between the remedies available for a violation of the Rule and for an involuntary guilty plea (*id.* at 833):

> A defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction.

106, 111 (2d Cir. 1977); *Bachner* v. *United States*, 517 F.2d 589, 597 (7th Cir. 1975).

Respondent's allegations satisfied neither of these tests. His motion to vacate sentence did not allege that he was actually unaware of the special parole provisions, much less that he would not have pleaded guilty if he had been fully informed of the consequences of his plea,[7] and the district court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea bargain (App. D, *infra*, 22a).[8] Moreover, as

[7] Although the memorandum of law submitted in support of respondent's Section 2255 motion stated that "[d]efendant did not know of the mandatory special parole term" (p. 4), this allegation, unlike the contents of the motion, was not verified, and respondent did not offer to submit an affidavit to support the assertion. The allegation was suspect, in any event, in light of counsel's representation at the Rule 11 proceeding that he had explained to respondent the consequences of his plea (Tr. 16). See also H. 7.

[8] The district court remarked (H. 16): "I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, 'You will be subjected to a parole term of at least three years,' as far as his guilty plea is concerned." The court of appeals did not disturb this fact finding, which is amply supported by the record. As the Seventh Circuit has observed:

> Unlike ineligibility for parole, which 'automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances,' the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it

the district court noted (*id.* at 18a), respondent's sentence of 10 years' imprisonment and five years' special parole was no greater—indeed, was materially less, for all practical purposes—than the 15 years' imprisonment that he was advised he could receive if he pleaded guilty.

2. In these circumstances, with no finding that the district court's technical noncompliance with one aspect of Rule 11 rendered respondent's plea either involuntary or so unfair as to be "a complete miscarriage of justice," there are substantial reasons why claims such as respondent's should not be cognizable on collateral attack. To begin with, this is not a case in which "the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Hill* v. *United States*, *supra*, 368 U.S. at 428. A trial judge's failure to mention the mandatory special parole term during the Rule 11 proceeding normally will be immediately apparent to the defendant upon imposition of sentence, especially if his ignorance of the special parole requirement truly played a meaningful role in his decision to plead guilty. When the period of special parole is announced, the defendant should be instantly aware, if it is true, that he has been given

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would be to assume that he would be influenced by other contingencies he is not advised about.

Bachner v. *United States*, *supra*, 517 F.2d at 597 (citation omitted). See also *id.* at 598-599 (Stevens, J., concurring); *Johnson* v. *Wainwright*, 456 F.2d 1200, 1201 (5th Cir. 1972) (likelihood that district court's mention of parole term would cause a defendant to change his decision to plead guilty "is so improbable as to be without legal significance").

a more severe sentence than he anticipated could be imposed. It is not unreasonable to hold that the remedy in that situation should be a timely motion to withdraw the plea under Fed. R. Crim. P. 32(d) or a direct appeal of the conviction.[9]

Furthermore, allowing a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceedings for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution on the underlying offenses may be difficult or impossible. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13. *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir.), cert. denied, 374 U.S. 857 (1963). As the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

Here, for example, it should have been obvious to respondent (and his counsel) at sentencing that the

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[9] Even on direct appeal, of course, it is arguable that the harmless error rule of Fed. R. Crim. P. 52(a) should be applied to inconsequential Rule 11 violations. See *United States* v. *Scharf*, 551 F.2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F.2d 962, 966 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977). But see, *e.g.*, *United States* v. *Palter*, 575 F.2d 1050 (2d Cir. 1978); *United States* v. *Clark*, 574 F.2d 1357 (5th Cir. 1978).

trial judge had neglected to mention the special parole requirement during the Rule 11 proceeding. Yet respondent's unexplained delay of almost two years in raising his objection will, if the court of appeals' decision is not overturned, require the government to reprosecute a complicated conspiracy case long after the occurrence of the criminal conduct, a task made especially burdensome by the fact that respondent's plea allowed him to avoid trial with his co-defendants. See *United States* v. *Barker*, 514 F.2d 208, 222 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 1013 (1975).[10]

These important concerns would be seriously undermined if every violation of Rule 11, no matter how inconsequential, justified Section 2255 relief. Indeed, the problem will be exacerbated by the 1975 amendments to the rule, which expand substantially the range of subjects on which a trial judge must advise a defendant before accepting his guilty plea. See Fed. R. Crim. P. 11(c)(1)-(5).[11] More than 80% of all federal criminal convictions follow pleas

[10] Twenty-two defendants were indicted in this case; 11, including respondent, pleaded guilty; five defendants were found guilty by a jury.

[11] Courts have recently found Rule 11 violations, for example, in the trial judge's failure to address the defendant personally (*United States* v. *Hart*, 566 F.2d 977 (5th Cir. 1978)) or to advise the defendant "that if he pleads guilty * * * the court may ask him questions about the offense * * * and if he answers these questions under oath * * * his answers may later be used against him in a prosecution for perjury" (*United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976); see also *United States* v. *Boone*, 543 F.2d 1090 (4th Cir. 1976)).

of guilty,[12] and minor deviations from Rule 11 are inevitable in a not insignificant percentage of these cases. The strong societal interest in the finality of judgments suggests that, unless a violation of the rule materially influenced the defendant's decision to plead guilty, it should be raised on direct appeal or not at all.

3. As the court of appeals acknowledged (App. A. *infra*, 5a-7a), the circuits have disagreed sharply over the availability of Section 2255 relief for mere violations of Rule 11. Along with the Sixth Circuit, three courts—the First,[13] Third,[14] and Ninth Circuits[15]—have held that a defendant who was not informed of the mandatory special parole term at the

[12] In fiscal year 1977, 35,335 of the 43,248 federal convictions, or 81.7%, followed pleas of guilty. In fiscal year 1976, the figures were 33,327 out of 40,975, or 81.3%. Source: *1977 Annual Report of the Director of the Administrative Office of the United States Courts*, Table 38 at p. 143.

[13] *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975). But cf. *United States* v. *Tursi*, 576 F.2d 396 (1st Cir. 1978), denying a motion to vacate a guilty plea entered under the 1966 version of Rule 11 because the defendant had not been told that the plea would waive his privilege against self-incrimination.

[14] *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974). In *Horsley* v. *United States*, No. 77-2297 (3d Cir. Aug. 28, 1978), the court purported to adopt the *Hill* and *Davis* standard but held that the failure adequately to inform the defendant of the nature of the charges against him was "inherently prejudicial" (slip op. 8).

[15] *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977). See also *Yothers* v. *United States*, 572 F.2d 1326 (9th Cir. 1978); *Sanchez* v. *United States*, 572 F.2d 210, 211 (9th Cir. 1977).

time of his guilty plea is entitled to attack his conviction collaterally, regardless of whether the error actually influenced his plea or otherwise rendered its continued validity inequitable.

On the other hand, five courts—the Second,[16] Fourth,[17] Seventh,[18] Eighth,[19] and Tenth Circuits[20]—have denied collateral relief in identical circumstances, holding that technical violations of Rule 11 may not be raised under Section 2255 and that the standard announced in *Hill* and *Davis* requires a case-by-case determination whether the failure to advise a defendant of the special parole requirement has resulted in a "complete miscarriage of justice."

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[16] *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977). The court of appeals initially followed an automatic reversal rule in *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975), but in *Del Vecchio* it reconsidered its position in light of *Davis*.

[17] *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), cert. denied, 424 U.S. 918 (1976). See also *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978).

[18] *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975).

[19] *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). See also *Schriever* v. *United States*, 553 F.2d 1152 (8th Cir. 1977); *United States* v. *Kattou*, 548 F.2d 760 (8th Cir. 1977); *United States* v. *Ortiz*, 545 F.2d 1122 (8th Cir. 1976); *United States* v. *Rodrigue*, 545 F.2d 75 (8th Cir. 1976). Like the Second Circuit, the Eighth Circuit's current view represents a change in position. See *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).

[20] *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), cert. denied, 434 U.S. 834 (1977). See also *United States* v. *Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Evers* v. *United States*, 579 F.2d 71 (10th Cir. 1978).

The Fifth Circuit also has rejected a collateral attack by a defendant who was not advised of the mandatory special parole term (*Johnson* v. *United States*, 542 F.2d 941 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977)), but it has subsequently ruled in cases not involving the special parole provisions that any failure to comply with the requirements of Rule 11, whether or not prejudicial, warrants Section 2255 relief.[21] Finally, the District of Columbia Circuit has noted the conflict among the circuits on this issue but has declined to side with either group, holding instead that all attempts to withdraw a guilty plea, no matter how long after conviction and regardless of the circumstances, must be brought under Fed. R. Crim. P. 32(d) and judged under that rule's "manifest injustice" standard, rather than under Section 2255. *United States* v. *Watson*, 548 F.2d 1058 (D.C. Cir. 1977).

In sum, we agree with the following remark of the court of appeals (App. A, *infra*, 11a n.16):

> Given the frequency with which this issue arises and the severe split among the circuits, hopefully the Supreme Court will resolve this issue in the near future. Every circuit * * * has expressed its position on this issue which is at the heart of the administration of the federal

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[21] See *Keel* v. *United States*, 572 F.2d 1135 (5th Cir.), rehearing en banc granted, 572 F.2d 1137 (1978); *Coody* v. *United States*, 570 F.2d 540 (5th Cir.), rehearing en banc granted, 576 F.2d 106 (1978). See also *Howard* v. *United States*, 580 F.2d 716 (5th Cir. 1978); *Sassoon* v. *United States*, 561 F.2d 1154, 1160 (5th Cir. 1977); *Canady* v. *United States*, 554 F.2d 203 (5th Cir. 1977).

drug laws in particular (the effect of 21 U.S.C. § 841 (b)) and all federal criminal laws in general (the scope of § 2255 relief after *Davis*).

The Court should accept this invitation to resolve an important and disputed question of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1978

APPENDIX A

No. 77-1572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES TIMMRECK, *Petitioner-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

APPEAL from the United States District Court
for the Eastern District of Michigan.

Decided and Filed June 12, 1978.

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

CELEBREZZE, Circuit Judge. This is yet another case involving a 28 U.S.C. § 2255 motion to vacate a sentence entered upon a guilty plea taken in violation of Federal Rule of Criminal Procedure 11. We reaffirm this circuit's position requiring strict adherence to Rule 11 and allowing deviation therefrom to be challenged in a § 2255 proceeding. We reverse the district court's denial of relief.

Charles Timmreck entered a plea of guilty to conspiracy to distribute a controlled substance, 21 U.S.C.

§ 846, on May 24, 1974, pursuant to a plea bargain which resulted in the dismissal of other charges pending against him. The district court inquired as to the voluntariness of the plea and informed Timmreck that he could be sentenced to as much as fifteen years confinement and a $25,000 fine, which he acknowledged understanding. The record does not reflect, however, that the court informed Timmreck, or that he otherwise knew, about the three year minimum mandatory special parole term that 21 U.S.C. § 841 (b) (1) (A) requires to be added to any other sentence meted out for the offense charged.[1] The court accepted the guilty plea and, on September 19, 1974, sentenced Timmreck to ten years in prison, a $5000 fine, and an additional special parole term of five years. No appeal followed.

On August 11, 1976, Timmreck moved pursuant to 28 U.S.C. § 2255 to vacate the sentence entered upon his guilty plea. The sole ground for the motion was that his plea had been accepted in violation of Rule 11 since he was not informed of the three year minimum mandatory special parole term that had to be added to whatever sentence he otherwise received. The district court agreed that such advice had not been given. If noted, however, that Timmreck had been

[1] The three year minimum mandatory special parole term mandated by 21 U.S.C. § 841 (b) (1) (A) is unlike ordinary parole in that it must be tacked onto the end of any other sentence and does not take effect until the expiration of the primary sentence, including ordinary parole. *See Roberts* v. *United States*, 491 F.2d 1236, 1237-38 (3d Cir. 1974); *United States* v. *Richardson*, 483 F.2d 516, 518 (8th Cir. 1973).

sentenced to ten years confinement plus five years special parole, the total of which was within the fifteen years he had been told was possible, and that the $5000 fine was within the $25,000 limit explained to him. Because Timmreck's total actual sentence did not exceed the maximum outlined to him at the plea hearing, the district court found no fundamental unfairness and denied § 2255 relief on that basis. 423 F. Supp. 537 (E.D. Mich. 1976).

The holding of the district court is squarely contrary to *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975). *See also United States* v. *Cunningham*, 529 F.2d 884, 888 n.2 (6th Cir. 1976). *Wolak*, legally indistinguishable from this cause, also involved a § 2255 motion to vacate a sentence after a plea of guilty to a violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.*[2] The district court in *Wolak* failed to explain to the defendant that a consequence of his guilty plea would be the imposition of at least a three

[2] *Wolak* also involved the pre-1975 amendment version of Rule 11, which required only that the defendant plead "voluntarily with understanding of the nature of the charge and the consequences of the plea." The result we reach here and that reached in *Wolak* are compelled *a fortiori* by new Rule 11, which specifically requires that the defendant understand "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." The three year minimum mandatory special parole term would affect both the mandatory minimum and maximum possible penalties. *See United States* v. *Yazbeck*, 524 F.2d 641, 643 n. 1 (1st Cir. 1975).

year special parole term in addition to any custodial sentence.[3] We held that the district court erred both in not explaining the mandatory nature of the special parole and in misstating the required three year minimum term. 510 F.2d at 166. It was "our determination that, in order to comply with Rule 11, the district judge must inform a defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitations on parole or probation." *Id.* We reversed the denial of the § 2255 motion and instructed the district court to vacate the sentence and permit the defendant to plead anew. The same result must obtain here.

The district court was aware of our decision in *Wolak* but did not deem it controlling.[4] Instead, the court relied heavily upon several recent cases from other circuits, discussed *infra*, which have held that Rule 11 violations do not entitle one to § 2255 relief unless the error was a "fundamental defect which inherently results in a complete miscarriage of jus-

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[3] As noted by the district court here, the district court in *Wolak* did mention the special parole term to the defendant at the plea hearing but incorrectly explained it when the defendant indicated he did not understand it. There can be no reasoned distinction, however, between an affirmative misstatement of the provisions of the special parole term and failure to disclose that it exists at all.

[4] The district court apparently felt *Wolak* was distinguishable from this cause. The district court gave no explanation, however, for ignoring similar language found in *United States* v. *Cunningham*, 529 F.2d 884, 888 n. 2 (6th Cir. 1976), even while quoting the relevant language in its entirety, 423 F. Supp. at 539 n. 2.

tice."[5] We decline to follow these cases which we consider contrary both to *Wolak* and relevant Supreme Court authority.[6]

The starting point for any Rule 11 cases must be *McCarthy* v. *United States*, 394 U.S. 459 (1969). In *McCarthy*, the Supreme Court mandated strict compliance with Rule 11 before a district court can accept a guilty plea. The Court held "that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *Id.* at 471-72. The remedy required for a Rule 11 violation was allowing the defendant to plead anew.

In the wake of *McCarthy's* strict language, every circuit to address the issue through 1974 held that the very factual pattern presented here (*i.e.*, failure to inform the defendant of the mandatory special parole term of § 841(b)) was a violation of Rule 11 which required vacation of the sentence entered upon the guilty plea. The cases also held this issue could be

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[5] This language, adopted by other circuits, comes from *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting in turn from *Hill* v. *United States*, 368 U.S. 424, 428 (1962), discussed *infra*.

[6] The district courts in this circuit are, of course, bound by pertinent decisions of this Court even if they find what they consider more persuasive authority in other circuits. *See Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *Union Carbide Corp.* v. *Graver Tank & Mfg. Co.*, 345 F.2d 409, 411 (7th Cir. 1965).

raised in a § 2255 proceeding. *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974);[7] *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974); *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).

After 1974, however, the results began to diverge. All circuits addressing the issue presented here continued to hold that failure to inform a defendant of the special parole term constitutes a violation of Rule 11, making vacation of sentence necessary if challenged on direct appeal. But the circuits have split on whether such a Rule 11 violation can be successfully challenged in a § 2255 proceeding. Three circuits still allow § 2255 movant to vacate his sentence and plead anew. *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977);[8] *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975);[9] *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975). Five other circuits, including the second and eighth which had ruled otherwise before 1974, have opted for a different result. These courts have held that a § 2255 movant is entitled to

[7] In *Michel* the defendant could not take advantage of this holding since he had been informed of the required special parole term, but the holding in *Michel* was held to apply retroactively in *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975).

[8] *See also United States* v. *Harris*, 534 F.2d 141 (9th Cir. 1976) allowing withdrawal of a guilty plea for this Rule 11 violation pursuant to Federal Rule of Criminal Procedure 32(d).

[9] It is not clear whether *Yazbeck* was a § 2255 or Rule 32(d) case. In any event, the motion to vacate the sentence was made eight months after the guilty plea was accepted.

vacation of his sentence only if he can demonstrate prejudice from the Rule 11 violation.[10] *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977); *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), *cert. den.* 434 U.S. 834 (1977);[11] *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), *cert. den.* 429 U.S. 1045 (1977);[12] *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), *cert. den.* 424 U.S. 918 (1976); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Section 2255 relief was denied in each of these cases since no prejudice was thought to exist when, like here, the defendant's actual sentence, including the special parole term, was within the maximum possible sentence specified at his plea hearing.

The reason for this sudden shift after 1974 was the decision that year of *Davis* v. *United States*, 417 U.S. 333 (1974). *Davis* did not involve a guilty plea but rather dealt with § 2255 relief after a jury conviction. The Supreme Court held that a change in the law after conviction, and not just constitutional er-

[10] The position of the District of Columbia circuit is ambiguous. When presented with the issue, it remanded the cause to the district court with directions to treat the § 2255 motion to vacate as a Rule 32(d) motion. *United States* v. *Watson*, 548 F.2d 1058 (D.C. Cir. 1977).

[11] See also *United States* v. *Eaton*, 579 F.2d 1181 (10th Cir. 1978), 23 Crim. L. Rptr. 2092, following *Hamilton*, and noting that the special parole term could be for life.

[12] *See also, United States* v. *Kattou*, 548 F.2d 760 (8th Cir. 1977), *United States* v. *Rodrique*, 545 F.2d 75 (8th Cir. 1976), *and United States* v. *Ortiz*, 545 F.2d 1122 (8th Cir. 1976), following *McRae*.

rors at trial, could serve as the basis for a § 2255 proceeding. The Court added a paragraph of dicta, however, which we reproduce here in full:

> This not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted). The Court did not suggest that any line could be drawn on the basis of whether the claim had its source in the Constitution or in the "laws of the United States." 417 U.S. at 346

This paragraph has been seized upon by four of the five circuits requiring a § 2255 movant to show prejudice in order to vacate a sentence entered upon a plea of guilty taken in violation of Rule 11.[13] *Del*

[13] *Bell*, 521 F.2d at 715, reached this result without citation of *Davis*.

The Fourth Circuit did, however, rely upon *Davis* (and, *inter alia*, *Del Vecchio*, *Hamilton* and *McRae*) in reaching the

Vecchio, 556 F.2d at 110; *Hamilton*, 553 F.2d at 65; *McRae*, 540 F.2d at 945; *Bachner*, 517 F.2d at 591. It was also relied upon by the district court here. 423 F.Supp. at 539. These courts have held that the conceded Rule 11 error is not cognizable in a § 2255 proceeding when the defendant's total actual sentence is within that specified at the plea hearing. This is justified by reference to *Davis*, concluding that "the claimed error of law was [not] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *See Del Vecchio*, 556 F.2d at 110-11; *Hamilton*, 553 F.2d at 66; *McRae*, 540 F.2d at 945; *Bachner*, 517 F.2d at 592-93. *See also Bell*, 521 F.2d at 714-15 (harmless error analysis).

We are thus faced with the difficult task of reconciling the somewhat contradictory language of the Supreme Court in *McCarthy* and *Davis*. On the one hand, the Court said in its unanimous[14] decision in *McCarthy* that "prejudice inheres in a failure to comply with Rule 11." 394 U.S. at 471. On the other hand, at first blush the Rule 11 violation at issue here does not seem to rise to the level of a "fundamental defect which inherently results in a complete miscarriage of justice." 417 U.S. at 346.

same result in a case involving a different Rule 11 violation. *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978), 23 Crim. L. Rptr. 2137. The court in *White* did not even cite *Bell* for support.

[14] Justice Black filed a separate concurring opinion.

Our decision is controlled, however, by our prior post-*Davis* decision in *Wolak*.[15] Moreover, between *McCarthy* and *Davis* we consider *McCarthy* more apposite to this cause. *McCarthy* was, as this, a Rule 11 case and the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11. The relevant paragraph in *Davis* was dicta which relied on *Hill* v. *United States*, 368 U.S. 424 (1962), which involved a violation of Federal Rule of Criminal Procedure 32(a) allowing a defendant to speak on his behalf before imposition of sentence. Admittedly *McCarthy* involved a direct appeal but if "prejudice inheres in a failure to comply with Rule 11," then it must be cognizable in a § 2255 proceeding. We reconcile *McCarthy* and *Davis* by holding that a Rule 11 violation is per se prejudicial and thus must be a

[15] One panel of this Court cannot overrule the decision of another panel; only the Court sitting *en banc* can overrule a prior decision. *See Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832, 847-48 n. 119 (D.C. Cir. 1976), and cases cited therein; *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *McClure* v. *First Nat'l Bank*, 497 F.2d 490, 492 (5th Cir. 1974), *cert. den.* 420 U.S. 930 (1975).

We recognize that neither *Wolak* nor any of the other cases reaching the same result after *Davis* mention *Davis*. This is probably because the holding of *Davis* is irrelevant to the issue presented; only the paragraph of dicta quoted earlier is relevant. Nevertheless, we do not believe that *Wolak's* failure to cite *Davis* serves as a basis for distinguishing it. We believe the courts which contend that the quoted paragraph of *Davis* represented a new development in the law are incorrect since the paragraph at issue consists almost entirely of a quotation and paraphrase of a case decided in 1962. *See, Del Vecchio and McRae, supra*, modifying *Michel* (and *Ferguson*) *and Richardson, supra*, respectively.

"fundamental defect which inherently results in a complete miscarriage of justice." We feel that any other reconciling of the two cases which emphasizes *Davis* over *McCarthy* should come only from the Supreme Court.[16]

We recognize that our decision "erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him," *Del Vecchio*, 556 F.2d at 109 (footnote omitted), since memories fade and witnesses become unavailable over time. Finality is a salutary principle which should be furthered by the courts. *Blackledge* v. *Allison*, 431 U.S. 63, 71-72 & 83-84 (Powell, J. concurring) (1977); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n. 13 (1977). Finality is best served, however, by insisting that guilty pleas be accepted properly initially rather than by narrowing the scope of collateral relief. The failure to preserve finality in this and similar cases must be laid squarely at the feet of the United States Attorneys and their assistants who fail to exercise the rather small degree of care necessary to comply with

[16] Given the frequency with which this issue arises and the severe split among the circuits, hopefully the Supreme Court will resolve this issue in the near future. Every circuit except the fifth, *cf. Johnson* v. *United States*, 542 F.2d 941 (5th Cir. 1976), *cert. den.* 430 U.S. 934 (1977) (§ 2255 relief denied for other Rule 11 violation), has expressed its position on this issue which is at the heart of the administration of the federal drug laws in particular (the effect of 21 U.S.C. § 841(b)) and all federal criminal laws in general (the scope of § 2255 relief after *Davis*.)

Rule 11.[17] The Supreme Court said in *McCarthy* that one purpose of requiring strict adherence to Rule 11 was to "reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the record is inadequate." 394 U.S. at 472. The large number of Rule 11 errors in the reported cases suggests that this admonition is not being heeded.[18] We hope that our ruling herein will motivate strict compliance with Rule 11 in the future.

The judgment of the district court is reversed and the cause is remanded with instructions to vacate the sentence entered upon the guilty plea and to allow Timmreck to plead anew.

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[17] The district courts, of course, are also responsible for Rule 11 errors since Rule 11 is directly addressed to the court accepting the guilty plea. If the district court does not fully comply with Rule 11, the government attorney should realize this and take steps to insure the necessary colloquy is placed in the record.

[18] "The case is another of the many we have had that attack a conviction on a guilty plea because the district judge allegedly failed to follow the directions of Fed. R. Crim. P. 11." *Del Vecchio*, 556 F.2d at 107.

"These appeals challenging two guilty pleas and sentences thereon arise, like many others, from omissions by trial judges to advise a defendant at a hearing on a plea of guilty of special provisions of the federal narcotics laws relating to sentencing. . . ." *Bachner*, 517 F.2d at 590-91 (footnote omitted).

The above quoted sentences are the very first sentences in each of the above cases, suggesting the courts' frustration with this problem.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1572

[Filed June 12, 1978]

CHARLES TIMMRECK, PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

Before CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to vacate the sentence entered upon the guilty plea and to allow Timmreck to plead anew.

It is further ordered that Petitioner-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1572

[Filed August 7, 1978]

CHARLES TIMMRECK, PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

ORDER

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

Appellee filed a petition for rehearing with a request for rehearing en banc. No judge of this court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, Clerk

By /s/ Grace Keller
GRACE KELLER, Chief
Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No: 6-71867

CHARLES TIMMRECK, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

MEMORANDUM OPINION

Petitioner, Charles Timmreck, pleaded guilty to a violation of 21 U.S.C. § 846 (conspiracy to distribute a controlled substance) on May 24, 1974. On September 19, 1974, he was sentenced to a prison term of ten years, a five thousand dollar committed fine, and a special parole term of five years. Timmreck now brings a motion to vacate this sentence (28 U.S.C. § 2255) claiming that the trial court failed to inform him of the mandatory special parole term prescribed by 21 U.S.C. § 841(b). Timmreck claims that he was not made fully aware of the possible consequences of his plea and asks that the plea and sentence be vacated.

Upon careful review of the transcript of the plea proceedings, it appears that the court informed Timmreck that he could serve as long as fifteen years in jail and be subjected to a fine of $25,000. (Tran-

script at 7, 8). No mention was made of the mandatory special parole term.

When a guilty plea is taken the court must address the defendant personally in open court in order to determine "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Rule 11, Federal Rules of Criminal Procedure (1966 version).[1]

The United States Supreme Court has construed Rule 11 to "hold that a defendant is entitled to plea anew if a United States District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *McCarthy* v. *United States*, 394 U.S. 459, 463 (1969). The Court in *McCarthy* held that the defendant should have been permitted to withdraw his plea when the district judge had neither examined the defendant personally to determine the voluntariness of his plea and his awareness of the nature of the charge nor made a record of the factual basis for the plea.

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[1] The Rule 11 referred to in this opinion is the rule in effect when Timmreck made his plea. The rule now in effect requires the court to address the defendant personally to inform him of and to determine that he understands

> "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law."

Rule 11(c)(1), Federal Rules of Criminal Procedure (1975 version).

The court would reach the same decision in this case if the 1975 version had been in effect when Timmreck's plea was taken.

Although *McCarthy* was not a § 2255 case, the United States Court of Appeals for the Sixth Circuit has made reference to its holding in reviewing motions made pursuant to 28 U.S.C. § 2255. In *Harris* v. *United States*, 426 F.2d 99 (6th Cir. 1970), for example, the defendant had not been informed that he was ineligible for parole. The court remanded for a hearing to determine whether the defendant had known of his parole ineligibility, but had the plea been made after the effective date of *McCarthy*, the court would have vacated the sentence. *Harris*, at 101. In *Harris*, the United States Court of Appeals approved ". . . [A]n interpretation of Rule 11 which requires a personal explanation of *anything which affects the length of detention*. . . ." [original emphasis]. *Spradley* v. *United States*, 421 F.2d 1045, 1046 (5th Cir. 1970), quoted in *Harris* at 101. *See also United States* v. *Wolak*, 510 F.2d 164, 166 (6th Cir. 1975) (The trial judge must personally "inform a defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitation on parole or probation."); *Phillips* v. *United States*, 519 F.2d 483, 485 (6th Cir. 1975) ("The requirement [is] that the judge personally discuss the consequences of the plea with a defendant at the time the plea is offered.").

The United States Court of Appeals for the Sixth Circuit has never directly addressed the situation presented in this case.[2] *Wolak* dealt with a situation

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[2] In *United States* v. *Cunningham*, 529 F.2d 884 (6th Cir. 1976), the court did address a similar situation indirectly. In that case the trial judge permitted defendants to withdraw

in which the trial judge had informed the defendant of the existence of a special parole term but had neglected to explain its meaning when the defendant indicated his lack of understanding. In *Phillips*, the trial judge had not addressed the defendant about any of the consequences of his plea but had relied on assurances of defense counsel that defendant had been fully advised by him.

Here the court told Timmreck that he could be imprisoned for fifteen years; Timmreck was then sentenced to ten years in jail plus a five-year special parole term. Since the jail sentence and the parole term together equal the term of imprisonment which Timmreck was informed he could receive, he was not prejudiced by the court's failure to inform him of the mandatory special parole term. Absent some indication of prejudice to the defendant or a complete miscarriage of justice, Section 2255 is unavailable to correct mere technical errors.

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their pleas after imposition of sentence solely because he had failed to inform them of the special parole term. Defendants were tried and convicted. On appeal, the Sixth Circuit found occasion to remark:

> ". . . [D]efendants were entitled to withdraw their pleas in this case because the district court did not comply with Rule 11, Federal Rules of Criminal Procedure, in failing to inform defendants of the possibility of special parole terms as provided by Sec. 841(b) . . . [citations omitted]. If the error had not been corrected at this point in the proceedings, it could have been raised through motion under 28 U.S.C. Sec. 2255."

Cunningham at n. 2.

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.* at 428. [internal quotation marks omitted].

Davis v. *United States*, 417 U.S. 333, 346 (1974).

The United States Courts of Appeals for the Fourth, Seventh and Eighth Circuits have applied the *Davis* reasoning in cases similar to this one. In *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), *cert. denied*, 96 S.Ct. 1121 (1976), the trial judge had informed the defendant that he could receive a prison sentence of fifteen years if he pleaded guilty. The defendant was later sentenced to six years' imprisonment and a three-year special parole term. The court held that where the prison sentence together with the special parole term were no more than the maximum prison term of which the defendant had been advised, vacation of the plea was not required either to insure its voluntariness or to create an adequate record under Rule 11. In *Bell*, the court decided that the

requirements of *McCarthy* were satisfied since the defendant had been informed of those consequences of his plea which would have an effect on the range of his punishment. *Bell* at 715.

Similarly, in *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), the United States Court of Appeals for the Eighth Circuit stated:

> [U]nder *Davis* the ultimate question to be determined is this: was there a fundamental defect in the proceedings which inherently resulted in a complete miscarriage of justice and presented exceptional circumstances that justify collateral relief?

McRae at 947.

In *McRae*, the court answered in the negative where the defendant had made a Rule 11 bargain for a seven year maximum prison term and his prison sentence and special parole term together equaled six years. *See also Sappington* v. *United States*, 523 F.2d 858 (8th Cir. 1975) (Webster, J., concurring).

The United States Court of Appeals for the Seventh Circuit upheld a ten year sentence and a three-year special parole term where the defendant had been advised that he could receive a sentence of fifteen years. *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Particularly instructive is the analysis of Judge Stevens:

> In this case I am satisfied that the trial judge's failure to advise the petitioner that he would have to serve a special parole term of at least three years after his release from prison did not make his plea involuntary. If there had been a material difference between the punishment which the judge had the power to impose and the punishment which the judge advised the defendant he could receive, the advice might be sufficiently deceptive to make the plea involuntary. That conclusion would follow regardless of what sentence the judge might impose; for, as I previously suggested the voluntariness of the defendant's choice is unaffected by an event occurring after his choice is made. In this case, I agree that the mandatory parole term, though a matter of importance, is a comparatively minor factor when considered in connection with the judge's advice to the defendant that he might be imprisoned for as long as 15 years. The omission, in my judgment, did not make the advice which was actually given materially misleading; accordingly, the plea was voluntary.
>
> On the fairness issue, I think the advice should be compared with the actual sentence rather than with a correct statement of the sentence that might properly have been imposed. As long as the actual sentence was less than the maximum as described in the judge's advice, I would find no unfairness—and certainly not any unfairness sufficiently grave to qualify as constitutional error.

Bachner at 599 (Stevens, J., concurring). *See also United States* v. *Dorszynski*, 524 F.2d 190 (7th Cir. 1975), *cert. denied*, 96 S.Ct. 1483 (1976); *Gates* v. *United States*, 515 F.2d 73 (7th Cir. 1975).

In none of the recent decisions which do indicate that a sentence should be vacated simply because the

trial judge neglected to inform the defendant of a special parole term does it appear whether the prison sentence together with the special parole term exceeded the maximum prison term of which the defendant had been advised. *See Roberts* v. *United States*, 491 F.2d 1236 (3rd Cir. 1974); *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975); *United States* v. *Harris*, 534 F.2d 141 (9th Cir. 1976); *United States* v. *Jones*, 540 F.2d 465 (10th Cir. 1976).

This is crucial. If the prison sentence together with the special parole term did exceed the maximum which the court had advised the defendant he could receive, that would amount to fundamental unfairness and would be reason to vacate or modify the sentence. However, that is not the situation in Timmreck's case. Timmreck's plea was voluntary; there was no fundamental unfairness in the proceeding.[a]

[a] In Timmreck's case the court notes also two additional factors: (1) defense counsel's assurance that he had told Timmreck about the possible consequences of his plea (Transcript at 16) and (2) the two years between sentence and motion to vacate. Both factors were viewed by the court in *McRae* as further indications of the voluntariness of the plea and the essential fairness of the proceeding. *McRae* at 947.

Accordingly, Timmreck's motion to vacate sentence is denied. An order is entered herewith.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

DATE: December 3, 1976,
Detroit, Michigan.

A TRUE COPY
HENRY R. HANSSEN
Clerk

By /s/ Bonnie Humm
Deputy Clerk

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